OCT 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-473

CHARLES W. FROUST

VERSUS

COATING SPECIALISTS, INC.

STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION LIMITED

VERSUS

WESTCHESTER FIRE INSURANCE COMPANY, ET AL

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I N D E X

	Page
Table of Authorities	i
Citations to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Facts Adduced at Trial	5
Reasons for Granting Writ	7
Conclusion	18
Proof of Service	19
Appendix "A" Minute Entry of U.S. District Court for Eastern District of Louisiana - December 27, 1972	21-22
Appendix "B"	23-29
Appendix "C"	30
Appendix "D"	31

TABLE OF AUTHORITIES - Page 1

	Page
Aetna Life Insurance Company of Hartford, Conn. v. Maxwell, 89 F.2d 988 (1973)	3,15
American Mutual Liability Insurance Co. v. Agricola Furniture Co., (S.Ct. Ala., 1937) 236 Ala. 535, 183 So. 677	10
Audubon Coin & Stamp Co. v. Alford Safe & Lock Co. (La. App.,1969) 230 So.2d 278	14
Beryllium Corporation v. American Mutual Liability Insurance Company, 223 F. 2d 71 (1955)	2,9,11
Buckeye Cotton Oil Company v. Ragland, (5th Cir., 1926) 11 F.2d 231	11
Canadian Radium & Uranium Corporation v. Indemnity Insurance Company, (S. Ct. ILL., 1952) 411 Ill. 334 104 N.E. 2d 256	12
Export S.S. Corp. v. American Ins. Co., 106 F.2d 9, aff'd on reh. 108 F.2d 1013, cert.den. 309 U.S. 686, 84 L.ed. 1029, 60 S.Ct. 809	3,16
Gentry v. Swann Chemical Co., (S.Ct. Ala., 1937) 234 Ala. 313, 174 So. 530	10
Globe Indemnity Co. of New York v. Banner Grain Co., (8th Cir., 1937) 90 F.2d 774	9

TABLE OF AUTHORITIES - Page 2

	Page
Jernigan v. Allstate Insurance Company, (5th Cir., 1959) 269 F.2d 353 ----------	14
Knight v. L. H. Bossier, Inc. (La. App. 1960) 118 So.2d 700 -----	14
Liberty Mutual Insurance Co. v. Thompson, (5th Cir., 1948) 171 F.2d 723 ----------	11
Maryland Casualty Co. v. Pioneer Seafoods Co., 116 F.2d 38 ---------	2,9,13
Soukop v. Employers Liability Assurance Corp., Ltd. of London, England, (S. Ct. Mo., 1937) 108 S.W. 2d 86 ----------	10
Woodward Iron Co. v. Minyard, (5th Cir., 1958) 170 F.2d 508 -----	9,10

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Steamship Mutual Underwriting Association Limited, petitioner, prays that a writ of certiorari issue to review the judgment of the United States District Court, Eastern District of Louisiana, entered on March 12, 1973, and of the United States Court of Appeals for the Fifth Circuit, entered on June 6, 1974, and the judgment denying rehearing entered on July 25, 1974.

CITATIONS TO OPINION BELOW

The minute entry of the United States District Court for the Eastern District of Louisiana, ordering entry of judgment dated December 27, 1973 is reproduced as Appendix "A". The District Court's opinion, printed in Appendix "B", is reported at 364 F. Supp. 1154.

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "C", is reported at 494 F.2d 1352.

The opinion of the United States Court of Appeals for the Fifth Circuit denying defendant's petition for rehearing entered on July 25, 1974, is unreported.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28, Section 1254(1) of the United States Code.

QUESTIONS PRESENTED

(1) Was the finding by the court below that silicosis contracted and aggravated during plaintiff's employment by Coating Specialists was not a disease resulting "directly from bodily injury by accident" as was expressly covered by the policies of certain underwriters at risk in direct conflict with prior Fifth Circuit decisions and the decisions of the Third Circuit in Beryllium Corporation v. American Mutual Liability Insurance Company, 223 F. 2d 71 (1955); and the Ninth Circuit in Maryland Casualty Co. v. Pioneer Seafoods Co., 116 F. 2d 38?

(2) Was the decision of the trial court

in holding that Steamship Mutual, the last insurer in consecutive time, was obliged to indemnify its assured, Coating Specialists, Inc., for the entire judgment rather than a pro rata share in direct conflict with the decisions of the Second Circuit in Export S. S. Corp. v. American Ins. Co., 106 F.2d 9, aff'd on reh. 108 F.2d 1013, cert. den. 309 U.S. 686, 84 L.ed. 1029, 60 S. Ct. 809, and the Fourth Circuit in Aetna Life Insurance Company of Hartford, Conn. v. Maxwell, 89 F. 2d 988 (1937)?

STATEMENT OF THE CASE

This is the first of a number of lawsuits brought on behalf of sandblasters/seamen seeking recovery of damages for silicosis contracted during their employment by Coating Specialists, Inc. (Coating) in the offshore oilfields. The outcome of this case will have a significant impact on those similar cases which are now pending, many of which are presently set for trial.

The original plaintiff, Charles Froust, entered the employ of Coating Specialists during March, 1959, and worked intermittently but for a significant period of time as a sandblaster until April, 1970. His work was on fixed offshore platforms, but Froust lived and ate on various Coating vessels upon which his sandblasting equipment and materials were carried. The vessels were tired to the platforms during sandblasting operations and served as bases from which the men worked.

During the early years of his employment, for protection against flying dust and other particles which were created by the sandblasting operations, Froust was provided with canvas "rebound" hoods which were fitted with glass face plates and screened holes at either

side, the latter being for ventilation and hearing purposes. From mid-1968 on, air-fed hoods were provided for use by the men.

On April 7, 1970 Froust completed a 14 day hitch and began his seven days of time off. He did not return to work. Within the month, he was seen by Dr. Morton M. Ziskind, a pulmonary specialist, at which time he complained of shortness of breath and soreness between the shoulder blades of approximately one month's duration. After examinations and tests, Dr. Ziskind was able to diagnose that Froust was suffering from progressive, uncomplicated silicosis.

Original defendants were Coating Specialists, Inc. (Coating), its primary insurers, Westchester Fire Insurance Co. (3/24/64-3/24/66), North River Insurance Co. (3/24/66-4/24/67), Insurance Company of North America (4/24/67-4/24/69), Steamship Mutual Underwriting Association Limited (Steamship Mutual) (4/24/69-4/24/70), and various excess underwriters.

Each of the above named primary insurers (referred to hereinafter as "prior insurers"), with the exception of Steamship Mutual, denied coverage, taking the position that silicosis is an injury by disease, in which case their policies would apply only if the plaintiff's last day of exposure to the conditions causing his silicosis fell within their period of coverage. Since it was undisputed that Froust last sandblasted during Steamship Mutual's period of coverage, it was maintained the exclusion, which was common to each prior insurer's policy, rendered them inapplicable.

On April 3, 1972, just prior to the commencement of trial, Froust's claim was settled for $175,000, plus costs. It was then

stipulated that he was employed by Coating between March, 1959 and April, 1970 as a seaman and a member of the crew of various Coating owned and operated vessels. It was further stipulated that during that period Froust contracted silicosis as a direct result of Coating's negligence and the unseaworthiness of the vessels to which he had been assigned. A judgment was entered against Coating, but its execution was suspended pending determination of the questions of insurance coverage by the trial court. The case was then tried to the court alone and taken under submission.

On December 27, 1972 the court ruled that silicosis was a disease and that the exclusions of the prior insurers were valid; therefore, the plaintiff was entitled to judgment against Coating and its insurer at the time of the "manifestation" of the disease, Steamship Mutual Underwriting Association Limited.

Thereafter, Steamship Mutual's motion for rehearing was denied on February 14, 1973.

A notice of appeal was filed on April 9, 1973. The appeal came on for hearing on May 1, 1974 and on June 6, 1974, the judgment of the district court was affirmed without discussion or consideration of the principles involved.

Steamship Mutual's petition for rehearing was denied on July 25, 1974.

FACTS ADDUCED AT TRIAL

To review the facts in greater detail, sandblasting is designed to strip steel offshore structures of paint and rust prior to the application of new paint. In the process, sand is directed against the structures at

high pressure, causing the individual particles to be broken into tiny fragments of silicon dioxide, or free silica. During and after the blasting, the particles of silica remain suspended in the air in clouds of dust.

When this dust is inhaled, the smallest of the foreign particles find their way into the lungs where they enter certain cells known as macrophages. The particles are toxic, or poisonous, and they destroy the cells creating scar tissue. Subsequently, the particles may be released from the destroyed cells and again ingested by other healthy macrophages which in turn are destroyed. Over a period of time this process, together with the continual introduction of new particles into the lungs, results in a coalescence of the scarring, forming nodules which are the distinctive signs of silicosis. The scarring has the ultimate effect of blocking oxygen in the lungs from diffusing through the lung walls into the blood vessels. In Froust's case, there was no bacteriological infection and his disease was characterized only by simple nodulation resulting from a series of insults to the lungs caused by the silica particles.

At trial it was shown that the protective equipment with which Froust was provided, that is, the simple canvas rebound hoods and the later model air-fed hoods, was inadequate to protect him from exposure to the poisonous silica particles. Equipment which would have provided a complete protective barrier, or an encapsulation of his respiratory system, had been on the market for a number of years, however.

Dr. Morton Ziskind, a medical expert, testified that x-rays taken on May 11, 1967, two years before Steamship Mutual became an

insurer of Coating, showed that Froust had silicosis at that time and had probably been suffering from the condition for about four years.

Froust himself indicated he was ignorant of the nature of silicosis and danger of contracting it until approximately one month before he first saw Dr. Ziskind on April 10, 1970. He had not received any warnings from Coating that he could contract such a disease from sandblasting. Dr. Ziskind's testimony that the size of the toxic particles which cause the disease are 3 microns or less in size, and therefore are incapable of being seen, felt or tasted, reinforces this assertion.

REASONS FOR GRANTING WRIT

Question 1

The pertinent portions of the policy(s) in question are attached as Appendix "D" (using the Insurance Company of North America's policy, which is identical in form to the others as an example). The identical provision which is contained in each policy issued by the prior insurers and on which they based their denials of coverage, reads as follows:

> "IV. Application of Policy - This policy applies only to injury (1) by accident, occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the assured, to conditions causing the disease occurs during the policy period."

Although the language of this provision

is somewhat confusing, it is argued that if Froust contracted or aggravated silicosis during one of the policy periods, there would be no coverage unless his last day of exposure to the causal or aggravating conditions fell within that policy period. On the other hand, if Froust was injured by accident during any policy period, coverage would attach regardless of considerations of exposure to causal conditions.

It is of the utmost significance that the policies do not turn on the simple question of whether the injury was the result of accident or disease alone. Again in idential language, the policies go on to define the distinction to be drawn between coverage for accidental injury as opposed to injury resulting from disease in the following terms:

> "The contraction of disease is not an accident within the meaning of the word 'accident' in the term 'bodily injury by accident' and only such disease as results directly from a bodily injury by accident is included within the term 'bodily injury by accident.' The term 'bodily injury by disease' includes only such disease as is not included within the term 'bodily injury by accident.'"

Although this provision is also somewhat difficult to understand, a close reading reveals that a disease which is the direct result of an accidental trauma falls within the accident provisions of the policy to which the "last exposure" exclusion does not apply. In other words, each policy applies to accidental injuries occurring during the policy period regardless of last exposure, and a disease may be included within the term accident if it results directly from an

accidentally caused bodily injury.

It should be clear that despite the pronouncements of the trial court, the question of whether silicosis is or is not a disease is not dispositive of the case. Rather, the "threshold" question which must be answered is whether the silicotic condition which Froust contracted was or is a disease resulting directly from an accidentally caused injury to the body or not. The trial court and the court of appeals simply did not address themselves to this issue. Even if Froust's silicosis was a disease, if it resulted directly from a bodily injury by accident, the decisions below are in error.

It has been argued below that the term accident is necessarily one which refers to an event which occurs suddenly and violently and produces a simultaneous injury to the physical structure of the body. However, in tort situations, the term accident has a much broader meaning than in compensation cases, where it is often defined statutorily. Globe Indemnity Co. of New York v. Banner Grain Co., (8th Cir., 1937) 90 F. 2d 774. See also Beryllium Corporation v. American Mutual Liability Insurance Company, (3rd Cir., 1955) 223 F.2d 71, and Maryland Casualty Co. v. Pioneer Seafoods Co., (9th Cir., 1940), 116 F. 2d 38.

It is interesting to note that the Fifth Circuit has been faced with the question of the nature of silicosis before in a case which turned on whether it was an occupational disease, or the normal, expected incident of a certain line of work. In Woodward Iron Co. v. Minyard, (5th Cir., 1958) 170 F.2d 508, a tort suit seeking damages for silicosis contracted by a mine worker in Alabama, it was shown, as it was in the case at bar, that the

plaintiff contracted silicosis because of his work in an extremely dusty environment where ventilation and dust control methods were inadequate or non-existent, despite the fact that technology made methods of dust control available. In affirming the trial court's award of damages to the plaintiff, the Fifth Circuit commented:

> "Silicosis is not an occupational disease, because it does not result from the ordinarily and generally known risks inherent to employment in the mining industry."

See also Gentry v. Swann Chemical Co., (S.Ct. Ala., 1937) 234 Ala. 313, 174 So. 530; Soukop v. Employers Liability Assurance Corp., Ltd. of London, England, (S.Ct.Mo., 1937) 108 S.W.2d 86.

More importantly, in the Woodward Iron case the court cited with approval a line of cases, including American Mutual Liability Insurance Co. v. Agricola Furniture Co., (S.Ct. Ala., 1937) 236 Ala. 535, 183 So. 677, where it was held that silicosis contracted by a worker over a ten year period as a direct result of his employer's continuous tortious failure to provide him with a safe place to work, was accidentally caused. The court stated:

> ". . . An occupational disease is not an accident even in its broad sense. The policies cover accidents which occur within the period of their respective term. A tort is often an accident, as when injury results from negligent conduct, and it may be of a continuous sort, and, if so, a recovery may be had for all damages which occurred within the

> period of limitations. . . and by successive action." (citations omitted)
>
> "When an act is continuous and all the time tortious and wrongful, it should not be exempted from such classification as an accident because it extends for a long period of time, however difficult it may be to separate the amount of damage done within the period of the statute of limitations from that occurring in the period preceding." (citations omitted)

At trial it was shown that there was available modern equipment which was sufficient to protect Froust and his co-workers from exposure to silica dust. The assured's negligence and the unseaworthiness of the vessels to which Froust was assigned were stipulated. Therefore, it was uncontested that Froust was not provided with a safe place to work. See also Liberty Mutual Insurance Co. v. Thompson, (5th Cir., 1948) 171 F.2d 723; Buckeye Cotton Oil Company v. Ragland (5th Cir., 1926) 11 F.2d 231.

The Fifth Circuit not only ignored its own precedents but those applicable cases decided by the Third and Ninth Circuits.

First, in the Beryllium Corporation case, supra, an insured company sued its comprehensive liability insurer for amounts which it expended in settlement of claims made by its employees for the deaths of their relatives which were caused by beryllium poisoning resulting from handling soiled work clothes over periods of not less than five years. There, the court found that the decedents were ignorant of the meance of beryllium and

the lodging of particles of the substance were distinctive events whether or not the victims were aware of the occurrences; therefore, the deaths resulted from a series of accidental causes. In discussing the question of whether the gradual poisonings were caused by accident, the Third Circuit stated:

> "While these deaths clearly resulted from accidental causes, it was not just one but a series of causes which produced them. Appellant contends that this defeats the claim. Its theory, as we have mentioned, is that the policy contemplated that the accidental means must be an isolated occurrence."
>
> "The policy may have so contemplated but if that were its purpose, it is not easy to explain why it did not say so. If restriction to covering accidents resulting from a single accidental cause was part of the protection furnished; added into the premium income, cost, etc., it seems curious that it was not plainly stated so that the insurance purchaser would know the limitations of his policy and at least have the opportunity to safeguard himself with more complete insurance. Supra at page 73. See also Canadian Radium & Uranium Corporation v. Indemnity Insurance Company, (S.Ct.Ill., 1952) 411 Ill. 334, 104 N.E.2d 256

There is no language in the policies at issue which purport coverage to single isolated occurrences. The criteria on which the Third Circuit's determination was made are identical.

In the Ninth Circuit case, Maryland Casualty Co. v. Pioneer Seafoods Co., supra, a seaman brought suit against his employer seeking recovery for tuberculosis contracted over a period of time as a result of the company's negligence in providing him with improperly constructed and equipped sleeping quarters. In affirming the trial court's finding that the contraction of tuberculosis was a "bodily injury accidentally suffered", covered by the policy at issue, the court stated:

> ". . . It is said that an accidental death is 'death from an unanticipated event, which happens as by chance, or which does not take place according to the usual course of things'. Under this broad rule, the physical weakening of Hanseth was unforeseen, unexpected and unusual as to him, and therefore the bodily injuries were accidental."
>
> "Under the policy, whether the injury was suffered as a result of accident is to be determined from Hanseth's standpoint, or in other words, while the event which caused the injury was the company's negligence, the occurrence of the event as to Hanseth was accidental." 116 F.2d at 40

The cases cited above follow the majority rule, and the one adhered to in the Louisiana jurisprudence, that in order to determine for purposes of insurance coverage whether a loss was caused by accident, the occurrence giving rise to the claim should be viewed from the standpoint of the person who was injured rather than the standpoint of the person who committed the act which caused the loss.

Knight v. L. H. Bossier, Inc., (La.App., 1960) 118 So.2d 700; Audubon Coin & Stamp Co. v. Alford Safe & Lock Co., (La. App., 1969) 230 So.2d 278; Jernigan v. Allstate Insurance Company, (5th Cir., 1959) 269 F.2d 353.

The testimony was clear that Froust did not suspect he would contract or had contracted silicosis until shortly before he was found to be disabled. The agents which caused his silicosis were, because of their microscopic size, incapable of being seen, felt or tasted. Since he was both unaware of the nature and danger of the disease and unable to detect the presence of the harmful agents through his senses, from his point of view, the contraction of silicosis was plainly an accident and within the coverage of the policies.

In sum, in a civil action for damages, the term accident is used in a broad sense, and has been taken to include a continuing series of distinctive events, whether they were noticed by the victim at the time or not. Froust's silicosis was caused by the lodging of innumerable tiny particles of silicon dioxide in his lungs during his long period of employment by Coating. The particles poisoned cells creating small scars which, as exposure continued, grew and coalesced forming nodules. There were no restrictions in the policies that the accidental cause of the injury must have been an isolated occurrence and since an accident or accidents leading to bodily injury by disease occurred during each policy period, under their own terms and provisions each policy applies.

Question 2

It is clear from the evidence that Froust was exposed to the harmful silica particles from his first day on the job in 1959.

Steamship Mutual did not insure Coating until 1969, ten years later, and two years after Froust is known to have contracted silicosis according to May, 1967 x-rays.

According to the medical testimony, if Froust had withdrawn from sandblasting in 1967, when he is known to have had what is known as grade 1 silicosis (out of three grades), within ten years he would have been expected to advance one grade. Yet, after May, 1967 Froust sandblasted for another 1-1/2 years, and at trial, five years after the x-rays were made and two years after he terminated his employment as a sandblaster, his silicosis had not progressed past grade 1.

Despite the fact that Coating's acts of negligence well before Steamship Mutual's coverage caused the plaintiff to contract silicosis, the trial court ruled that Steamship Mutual was liable to indemnify the company for the full amount of the judgment. This ruling flies in the face of the well settled principle that an insurer has no liability for events otherwise covered but which occurred before or after its policy period. This rule was well stated by the Fourth Circuit in the case of Aetna Life Insurance Company v. Maxwell, 89 F.2d 988 (1937). There, the question at issue was the responsibility of a professional liability insurer to a judgment creditor in a suit to enforce a malpractice policy. At trial it had been determined that the physician (assured) had improperly treated the injured party (plaintiff) from March 26, 1932 to August 7, 1932. In remanding the case for a determination of the amount of damages caused during the policy period, the court stated:

> "The issue decided in the case of the injured boy (plaintiff) against the physician (defendant-insured) was not the same as proposed against the insurance company in the pending action. There it was only necessary for the plaintiff to prove that the defendant had been negligent at any time during the treatment of the injury, and it is manifest in much, if not all, of the neglect which was proved took place before the policy was issued. Here, on the other hand, the defendant insurance company is liable only for such maltreatment or neglect as took place between July 23, the date of the policy and August 7, when the physician was discharged from the case. The insurance company has no greater liability for the negligence which took place before July 23 than it would have had if another physician not covered by the policy had been employed, or if Howell had been employed for the first time on July 23 to treat the injury, or if the prior period had been covered by the policy of another company." 89 F.2d at 992

Also on point is a Second Circuit decision, Export S. S. Corporation by American Ins. Co., 106 F.2d 9 (1939), aff'd on reh 108 F.2d 1013, cert. den. 309 U.S. 686, 84 L.ed. 1029, 60 S.Ct. 809, involving a cargo claim. There, a consignment of tobacco was stowed in a vessel's hold adjacent to a parcel of valonia, an acorn used in tanning processes. On discharge, the tobacco was found to be seriously damaged because of its exposure to the valonia during the course of the

voyage. The vessel owner settled the case and then sued its two insurers. The policy of the first insurer expired during the course of the voyage and the second policy immediately succeeded the first. The court determined that liability had accrued on a continuing basis as the damage was incurred from the time of stowage, throughout the voyage until discharge. It was held that although an insurer is bound to make its insured whole on losses due to liabilities that accrued during the term covered by the policy, conversely an insurer has no obligation for losses or liabilities accruing before and after the term. Therefore, the damage was divided between the two insurers.

Although the damage in this case was to a cargo of tobacco rather than a human body, nevertheless the principles enunciated in the decision and in the Maxwell case are the same and should be applied here. The Steamship Mutual policy although written on different terms than those of the prior insurers, is a time policy, that is, it has a commencement and termination date. Because the other contracts exclude coverage where the last exposure does not fall within their periods of coverage should not mean that Steamship agrees to accept full coverage because the last exposure is during its policy period. It its policy had even impliedly accepted coverage by including the same exclusionary provisions found in the policy of the prior insurers, this result might be justified, but there is nothing in the Steamship Mutual coverage which would even remotely suggest this.

It is submitted that it is incorrect and unjust to hold an insurer liable for events, even if otherwise covered, which occur before or after its policy period. It is inconceivable that Steamship Mutual should pay for

negligence or unseaworthiness against which it did not insure. We need not resort to hypothets to demonstrate the folly of this result, but only to fact situations in silicosis cases which are now pending. There, there are claimants who worked as sandblasters for Coating both before and after Steamship Mutual's coverage. There, insurers whose policies succeed Steamship Mutual's contain the same exclusionary provisions as the prior insurers' contracts here. If the prior insurers and insurers at risk immediately after Steamship Mutual are dismissed, then would Steamship Mutual be wholly liable for any award? Would it be liable to share on an equal basis with the insurer which is unfortunate enough to be last on the risk despite the fact that there are gaps during which there is no coverage both before and after its period of coverage? To make an insurer responsible for that which occurs without its coverage is clearly, intolerable, but yet that would be the effect should the decision be allowed to stand.

CONCLUSION

In conclusion, the decision below, based on undisputed facts, is in direct conflict with the law of Louisiana and raises a sharp conflict among the circuits on both points on which Steamship Mutual seeks review. The case is one of extreme importance in light of the number of similar cases now pending in this area and the decision below, if not reversed, will result in improper, unjust decisions and prevent a uniform application of the law to each fact situation.

For the foregoing reasons, this petiton

for a writ of certiorari should be granted.

Respectfully submitted,

TERRIBERRY, CARROLL, YANCEY & FARRELL

Benjamin W. Yancey
John A. Bolles

PROOF OF SERVICE

I, Benjamin W. Yancey, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing application for writs on:

Christopher Tompkins, Esq.
One Shell Square
New Orleans, Louisiana 70139

Robert B. Deane, Esq.
National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

Edward P. Lobman, Esq.
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Rudolph R. Schoemann, Esq.
3670 Gentilly Boulevard
New Orleans, Louisiana 70122

by mailing a copy thereof, postage prepaid, addressed to their respective offices, this 22nd day of October, 1974.

_____

APPENDIX A

MINUTE ENTRY
DECEMBER 27, 1972 FILED: JAN. 5, 1973
CHRISTENBERRY, J.

CHARLES W. FROUST SECTION "A"

V. No. 70-2747

COATING SPECIALISTS, INC., ET AL CIVIL ACTION

This cause came on on a former day for trial without the intervention of a jury, after which the court took time to consider, and counsel were given time to file briefs. A judgment based on stipulated findings of fact and conclusions of law had already been entered in favor of plaintiff Charles W. Froust and against defendant Coating Specialists, Inc., so that the only issues before the court at trial were those among the defendant insurers and Coating Specialists, Inc.

Now, after due consideration of the evidence and the briefs, the court finds that silicosis is a disease and that, therefore, plaintiff Charles W. Froust is entitled to judgment against defendant Coating Specialists, Inc. and its insurer at the time of manifestation of the disease, defendant Steamship Mutual Underwriting Association, Limited. The court further finds that defendants Great American Insurance Company, Westchester Fire Insurance Company, North River Insurance Company, Insurance Company of North America, Harbor Insurance Company, Certain Underwriters at Lloyds, and Employers Liability Assurance Corporation, Limited, are entitled to judgments dismissing the claims against them.

Accordingly, judgment will be entered in favor of plaintiff Charles W. Froust and against Steamship Mutual Underwriting Association, Limited in the sum of $175,000, plus the fees and costs specified in the judgment previously entered, together with interest from date of judgment until paid.

Counsel for the insurance company defendants which have been dismissed from the suit shall, in accordance with Local Rule 23 (B), prepare and submit draft findings of fact and conclusions of law.

- - - - - - - -

CC: All counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES W. FROUST SECTION "A"

VS. No. 70-2747

COATING SPECIALISTS, INC., ET AL. CIVIL ACTION
FILED: JUL 25, 1973

CHARLES W. FROUST No. 71-302

VS. CIVIL ACTION

COATING SPECIALISTS, INC.

(CONSOLIDATED CASES)

CHRISTENBERRY, JR.

Plaintiff sued his employer, Coating Specialists, Inc., and various insurers of his employer for damages under the Jones Act and the General Maritime Law, alleging that because of negligence of his employer and unseaworthiness of its equipment he contracted silicosis while employed as a sandblaster and spray painter at various times between March, 1959 and April, 1970. He brought a separate action against his employer for maintenance and cure.

The various insurers answered and denied coverage. Coating Specialists, Inc., ("Coating") also answered and filed third-party claims against these insurers. The actions were consolidated for trial.

Prior to trial, all parties stipulated that plaintiff was a seaman, employed by Coating as a sandblaster and spray painter

at various times from March, 1959 through April 7, 1970; that he contracted silicosis during the aforesaid period; that it was proximately caused by negligence on the part of Coating and unseaworthiness of its sandblasting equipment; and that plaintiff was entitled to damages in the amount of $175,000, plus certain specified fees and costs, and was due no further payment for maintenance or cure. Judgment was entered on this stipulation, in favor of plaintiff and against Coating, with the question of liability of the defendant insurers reserved for trial by the Court without the intervention of a jury.

Now, after due consideration of the evidence and the arguments and briefs of counsel, the Court finds that plaintiff, Charles W. Froust, is entitled to judgment against defendant Coating Specialists, Inc., and its insurer at the time of manifestation of the silicosis, Steamship Mutual Underwriting Association, Ltd. The Court further finds that defendants Great American Insurance Company, Westchester Fire Insurance Company, North River Insurance Company, Insurance Company of North America, Harbor Insurance Company, Certain Underwriters at Lloyds of London and Employers' Liability Assurance Company of Boston are entitled to dismissal of the claims against them and, in connection therewith, enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The process of sandblasting calls for the direction of sand under high pressure against a surface to be cleaned. As the sand disintegrates, acting as an abrasive to clean the surface, a cloud of finely

fragmented sand called free silica or silicon dioxide is produced. Inhalation of the silica particles into the human lungs can lead to silicosis.

2. Silicosis is a condition that is characterized by nodulation of tissue and development of fibrosis in the lungs.

3. While employed by Coating, plaintiff's duties consisted of sandblasting or spray painting either as a helper, mechanic[1/] or foreman. His exposure to silica commenced on the first day of his employment on which sandblasting was done and continued throughout his various periods of employment with Coating until he left Coating on April 7, 1970.[2/]

4. Plaintiff's prolonged exposure to silicon dioxide caused and aggravated the silicosis from which he now suffers.

5. During the period April 24, 1969 until April 24, 1970, Steamship Mutual Underwriting Association, Ltd. ("Steamship Mutual") insured Coating under a protection and indemnity policy against legal liabilities

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1/ The term "mechanic" is used to designate one who does the actual sandblasting or painting.

2/ Although defendant employer effected a change in the protection afforded to the sandblasters during this period, i.e., canvas hoods were supplanted by air-fed hoods in 1969, the testimony established that even with this new equipment his exposure to silica was sufficient to have caused or aggravated the condition.

such as herein asserted. The other defendant insurance companies ("prior insurers") insured Coating under workmen's compensation and employer's liability policies during various other periods from March, 1959 until April 24, 1969, the date that the coverage afforded by Steamship Mutual became effective.

6. All of the policies of the prior insurers contain (either directly or, in the case of the excess insurers, by incorporation of the terms of the underlying policies) an insuring agreement as follows:

> "APPLICATION OF POLICY"
>
> This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period."

7. All of the policies of the prior insurers also contain the following provision:

> "Bodily Injury by Accident; Bodily Injury by Disease.
>
> The contraction of disease is not an accident within the meaning of the work 'accident' in the term 'bodily injury by accident' and only such disease as results directly from a bodily injury by accident, is included within the term 'bodily injury by accident.' The term 'bodily injury by disease' includes only such disease as is not included within the term 'bodily injury by accident'."

8. Plaintiff's last exposure to conditions causing or aggravating the silicosis occurred on April 7, 1970, on which date he quit working for Coating Specialists, Inc. because of the progress of the silicosis.

CONCLUSIONS OF LAW

1. The threshold consideration in reaching a determination of which insurer or insurers cover Coating's liability is whether silicosis is an "injury by accident" or "injury by disease." If silicosis is an "injury by disease," then the prior insurers are entitled to judgment of dismissal as a matter of law, under the clear language of the insuring agreement upon which they rely.

2. In the first place, silicosis is generally understood, by laymen as well as by medical men, to be an insidious disease. For example, Webster's Third New International Dictionary defines silicosis as a condition of massive fibrosis of the lungs, marked by shortness of breath and resulting from prolonged inhalation of silica dust, and Schmidt's Attorneys Dictionary of Medicine defines silicosis as a disease of the lungs caused by the prolonged inhalation of dust derived from sand, stone, etc. In addition, silicosis is listed as an occupational disease in workmen's compensation laws, (e.g., La. R.S. 23:1031.1) and a contention that it is the result of bodily injury by accident was rejected by the United States Supreme Court in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018 (1949). Moreover, in this case, Dr. Morton N. Ziskind, Professor of Medicine in charge of the Pulmonary Diseases Section, Department of Medicine of Tulane University, directly testified that silicosis is a

disease, that it is an occupational disease and that he could not think of a situation in which it would not be an occupational disease.

3. Under the clear terms of their insuring agreements, therefore, the policies of the prior insurers do not apply in this instance because silicosis is an injury by disease and "the last day of the last exposure, in the employment of the insured, to conditions causing the disease" occurred during April, 1970, well after the policy period of any of the prior insurers.

4. On the other hand, the last exposure to conditions which caused or aggravated the disease occurred during the period of coverage provided by Steamship Mutual and it was during this period that the disease manifested itself. Steamship Mutual must indemnify Coating Specialists, Inc.

5. Therefore, judgment has been entered in favor of plaintiff and against defendants, Coating Specialists, Inc., and Steamship Mutual Underwriting Association, Ltd. in the full sum of One Hundred Seventy-five Thousand ($175,000) Dollars, plus the fees and costs specified in the judgment previously entered herein, together with legal interest at the rate of 7% thereon from date of judgment until paid. Judgment has also been entered dismissing with prejudice plaintiff's claims against Great American Insurance Company, Westchester Fire Insurance Company, North River Insurance Company, Insurance Company of North America, Harbor Insurance Company, Certain Underwriters at Lloyds of London, and Employers' Liability Assurance Company of Boston.

New Orleans, Louisiana, this 25th day of July, 1973.

s/Herbert W. Christenberry
UNITED STATES DISTRICT JUDGE

APPENDIX C

4518

Charles W. FROUST, Plaintiff,

v.

COATING SPECIALISTS, INC., et al., Defendants-Appellees.

STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED, Defendant-Appellant,

v.

WESTCHESTER FIRE INSURANCE COMPANY, et al., Defendants-Appellees.

No. 73-2781.

United States Court of Appeals, Fifth Circuit.

June 6, 1974.

Appeal from the United States District Court for the Eastern District of Louisiana; Herbert W. Christenberry, Judge.

Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

PER CURIAM:

The district court's findings of fact stand undisputed. We affirm the judgment of the district court for the reasons set forth in its adjudication, 364 F.Supp. 1154.

Affirmed.

INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA, PENNSYLVANIA

STANDARD WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY POLICY

A stock insurance company, herein called the company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A—Workmen's Compensation

To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.

Coverage B—Employers' Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in a state designated in Item 3 of the declarations or in operations necessary or incidental thereto.

II. Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy the company shall:

(a) defend any proceeding against the insured seeking such benefits and any suit against the insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended proceeding or suit, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such proceeding or suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the amounts payable under coverage A or the applicable limit of liability under coverage B.

III. Definitions

(a) Workmen's Compensation Law

The unqualified term "workmen's compensation law" means the workmen's compensation law and any occupational disease law of a state designated in Item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.

(b) State

The word "state" means any State or Territory of the United States of America and the District of Columbia.

(c) Bodily Injury by Accident; Bodily Injury by Disease

The contraction of disease is not an accident within the meaning of the word "accident" in the term "bodily injury by accident" and only such disease as results directly from a bodily injury by accident is included within the term "bodily injury by accident." The term "bodily injury by disease" includes only such disease as is not included within the term "bodily injury by accident."

(d) Assault and Battery

Under coverage B, assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

IV. Application of Policy

This policy applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period.

EXCLUSIONS

This policy does not apply:

(a) to operations conducted at or from any workplace not described in Item 1 or 4 of the declarations if the insured has, under the workmen's compensation law, other insurance for such operations or is a qualified self-insurer therefor;

(b) unless required by law or described in the declarations, to domestic employment or to farm or agricultural employment;

(c) under coverage B, to liability assumed by the insured under any contract or agreement, but this exclusion does not apply to a warranty that work performed by or on behalf of the insured will be done in a workmanlike manner;

(d) under coverage B, (1) to punitive or exemplary damages on account of bodily injury to or death of any employee employed in violation of law, or (2) with respect to any employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof;

(e) under coverage B, to bodily injury by disease unless prior to thirty-six months after the end of the policy period written claim is made or suit is brought against the insured for damages because of such injury or death resulting therefrom;

(f) under coverage B, to any obligation for which the insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of a state designated in Item 3 of the declarations, any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.